No. 96-779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

v.

RALPH P. FORBES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* PEROT '96 IN SUPPORT OF RESPONDENT

JAMIN B. RASKIN
Counsel of Record
American University
Washington College of Law
4801 Massachusetts Avenue, N.W.
Suite 442
Washington, D.C. 20016-8181
(202) 274-4011

R. CLAYTON MULFORD
General Counsel, Perot '96
Hughes & Luce, L.L.P.
1717 Main Street, Suite 2800
Dallas, TX 75201
(214) 939-5500

Attorneys for *Amicus Curiae* Perot '96

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INTEREST OF *AMICUS CURIAE*[1]

Perot '96 is the authorized campaign committee for the 1996 presidential candidacy of Ross Perot of Texas and his running mate, Pat Choate of Washington, D.C. Perot and Choate drew some 8,085,294 votes in 1996, and Perot won 19,741,048 votes in 1992.

Perot '96 has a general interest in revitalizing and diversifying American politics. It has a specific interest in opening up public candidate debates—which are critical to forming public opinion and voter choices—to the full breadth and diversity of American political beliefs.

Perot '96 has a particular interest in the outcome of this litigation. Despite the fact that they were on the ballot in all fifty states and the District of Columbia and had received nearly $30 million in federal funding based on Perot's 1992 general election performance, Perot and Choate were excluded by *Amicus* Commission on Presidential Debates ("CPD") from the 1996 presidential debates on the grounds that they had no "realistic chance of winning" the 1996 presidential election. *Perot v. Federal Election Comm'n*, 97 F.3d 553, 556 (D.C. Cir. 1996). Yet, when the privately-run CPD decided to exclude Perot in September of 1996, he stood at precisely the same point in the polls *vis a vis* President Clinton and Senator Dole as he did *vis a vis* President Bush and Governor Clinton in September of 1992, when the CPD decided to permit him to debate. Moreover, the polling data establish that the overwhelming majority of Americans favored the inclusion of Perot and Choate in the 1996 debates. Their exclusion deprived the American people of a critical chance to make a fully informed electoral choice and significantly depressed the general election vote totals for the Perot ticket.

Perot '96 would like to see the Supreme Court declare judgments by subordinate state actors regarding political viability and popularity

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[1] Pursuant to Rule 37.6 of this Court, *amicus* hereby states this brief was authored entirely by counsel for *Amicus Curiae* Perot '96. No person or entity other than *amicus curiae* made a contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

to be inherently discriminatory and unlawful standards for the exclusion of ballot-certified candidates from government-sponsored political debates.[2]

SUMMARY OF ARGUMENT

The Arkansas Educational Television Network ("AETN") argues that its debate should be treated as an exercise of journalistic editorial judgment. However, it did not act here as a neutral journalistic observer of campaign events. Rather, it decided to become an institutional participant in the political campaign by convening a public forum whose sole purpose was speech by candidates for the benefit of the electorate. As a state actor sponsoring a political candidate debate, AETN created a limited public forum.

Having created such a forum, AETN may not restrict access to a single class of candidates without showing compelling reasons for doing so. One interest it offers is to comply with the Federal Communication Commission's ("FCC's") licensing requirements, but nothing in the record or in federal law remotely suggests that the FCC required AETN to exclude Ralph Forbes, or would have taken its license away for allowing him to debate.

AETN also argues that it has a compelling interest to provide special programming not otherwise available to the public. But AETN nowhere explains why it needed to exclude Forbes in order to fulfill its distinctive mission. On the contrary, since private programmers frequently exclude from their debates all candidates but Democrats and Republicans, one would suppose that AETN's mandate to serve the whole public warrants the inclusion of *all* qualified candidates

[2] Perot '96 was unable to get the federal courts to waive the Federal Election Campaign Act's exhaustion of administrative remedies requirement and hear its case on an emergency basis during the campaign, *see Perot* at 556. Thus its complaint with the Federal Exection Commission challenging the CPD's actions is still live and outstanding. *See* Federal Election Commission Matter Under Review, 4451 (Sept. 5, 1996) and 4473 (Sept. 19, 1996). The complaint asserts, *inter alia*, that the CPD's use of standardless and subjective interpretations of political viability for selecting candidates to participate in debates is contrary to FEC regulations, statute, and the Constitution and thus raises issues analogous to those before the Court.

and their viewpoints, including Independents and new or minor party standard-bearers.

AETN has made no showing that the exclusion of Forbes served a narrowly-tailored compelling interest. Nor could it do so. The real reasons for excluding Forbes, as confessed earlier by AETN, were the viewpoint-specific and discriminatory ones of saving more time for the Democratic and Republican candidates and preventing Forbes from receiving the same "legitimacy" and "status" they were being extended.

Even if its debate were not a limited public forum, as a state actor AETN could not discriminate against a qualified congressional candidate on the putative grounds of his viability or seriousness. Such a standard, both as applied in this case and on its face, suppresses speech on the basis of political popularity and thus viewpoint.

AETN applied its unwritten test in a discriminatory fashion. It automatically invited all Republican and Democratic candidates in Arkansas's four congressional districts to participate, including those whose campaigns were hopeless and had no more chance to win than Forbes. It then subjected Forbes, the only Independent congressional candidate in the state, to an *ad hoc* and arbitrary test of his political viability. Forbes had no due process protections and was given no chance to make his case.

Government must be a neutral umpire in elections and may not play favorites with candidates. State legislatures may properly regulate the citizenry's access to a place on the ballot to assure a threshold level of seriousness among certified candidates. However, if subordinate state actors choose to sponsor debates, they must invite all qualified candidates on the ballot and may not invent new tests of candidate seriousness to replace ballot access laws. Once candidates meet agreed-upon threshold standards of seriousness for appearance on the ballot, public opinion must be given free reign to shape government, and not vice versa.

Elections serve purposes beyond certifying the highest vote-getter. They are democracy's way of promoting debate and allow-

ing candidates and parties to infuse new ideas and messages into public discourse. Restricting public debate by giving official effect to anticipated election results undermines these purposes. To exclude candidates on the basis of viability is, by definition, to discriminate against candidates with unpopular or untraditional views or those with fewer resources. The fact that AETN bore no malice or hostility towards Forbes is irrelevant.

There is no merit to the claim that upholding the Eighth Circuit's decision will flood governmental debate sponsors since ballot access laws already serve to limit electoral contests to serious candidates. In the last 25 general elections, there have been on average 75 Independent or minor party candidates in the 435 U.S. House districts. Today there would be on average no more than one extra candidate per House district.

ARGUMENT

I. BY ORGANIZING A CANDIDATE DEBATE, A STATE ACTOR CREATES A LIMITED PUBLIC FORUM AND MAY NOT EXCLUDE LEGALLY QUALIFIED CANDIDATES WITHOUT SHOWING THAT EXCLUSION SERVES A COMPELLING INTEREST

A. By Organizing a Congressional Candidate Debate, AETN Created a Limited Public Forum

When a government-owned television network organizes and stages a debate among political candidates, it creates a limited public forum by "intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (citations omitted). The forum consists of the governmental facilities, resources and time dedicated to expressive activity for the purposes of political debate among candidates. This may be "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."

Rosenberger v. Rectors and Visitors of Univ. of Va., 115 S. Ct. 2510, 2517 (1995).

Such a debate is a limited public forum for speech more than other such fora recently recognized by the Court, including after-school use of school facilities, *see Lamb's Chapel v. Moriches*, 508 U.S. 384 (1993), and a system of university payments to outside contractors for printing costs, *see Rosenberger, supra*. Here, beyond simply opening up its facilities for outside use or paying for the speech of others, the government is directly involved in staging, facilitating and promoting the speech of candidates.

Yet, AETN urges the Court to treat a government-arranged candidate debate as a form of journalistic reportage. See Br. for the Pet. at 24-30. On this theory, when AETN excluded Forbes from its debate, it did nothing more unlawful than omit him from a news report about the campaign. Accordingly, requiring AETN to invite Forbes to join the debate would be like forcing its news editor to profile his campaign when the editor did not consider it "newsworthy."

But the analogy between a government-sponsored debate and government-sponsored news journalism is badly skewed. When a public television network covers a political campaign—including candidate debates sponsored by private groups—it acts as a journalistic observer no different from any other network or newspaper. It does not organize campaign events but records and analyzes them. It is a witness, not a participant, and its corporate decisions do not intervene in the course of the campaign, influence the format of candidate debates, or define the nature and content of political dialogue among the candidates.

However, when a government media entity decides to go beyond simply covering an election campaign and chooses to sponsor a debate among candidates, it assumes a completely different role. It acts not as a journalist but as the convener of a political town meeting, a televised public forum in which candidates debate issues, appeal to voters and answer questions from journalists and citizens.

The whole purpose of sponsoring such a forum is to create a public space for political dialogue. If a government-organized debate is not a limited public forum for political speech, it is hard to imagine what is.[3]

AETN struggles to characterize its forum in such a way as to exclude Forbes by definition. It claims that it intended to define "the class of debate invitees" as "those candidates who had shown public support in their campaigns, who had a realistic chance of winning the election, and in whose views the television audience would be interested." Pet. for Writ of Cert. at 14. Yet this sleight-of-hand begs the constitutional question since AETN may not confine its forum to a sub-class of candidates without demonstrating a *compelling interest* in doing so.[4]

There would undoubtedly be a compelling interest in government restricting a debate to all candidates on the ballot and excluding write-in candidates and non-candidates who want to participate: the interest would be in allowing the electorate to see dialogue among all candidates who have been certified as meeting the state's required threshold of public support necessary to establish them as serious candidates.[5] But Petitioner has offered nothing like a com-

[3] The effort to liken government-run debates to journalism is thus deeply flawed. Acting as a journalist, AETN indeed would have maximum latitude in *covering* debates. If it had covered one sponsored by the League of Women Voters and found that Forbes' statements were not "newsworthy," it would have been free as a journalist to omit him entirely from its news coverage. However, once AETN decided to organize and sponsor a debate of its own, as a state actor intervening in an election campaign it could not treat candidates on the ballot in unequal fashion. As a journalistic entity, AETN can edit its news reports, but as a state actor it cannot edit candidates out of a campaign. It is a "central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978).

[4] *See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) ("In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject. . . . When speakers and subjects are similarly situated, the State may not pick and choose.").

[5] *Contra* the suggestion of *Amicus* CPD, *see* Br. of *Amicus Curiae* CPD at 4, n. 3, there would clearly be a compelling interest in excluding from debates write-in candidates, since they have not passed the state's legitimate and objective threshold test of political seriousness by securing a place on the ballot. *See infra* Part II.D.

pelling interest for restricting its debate to candidates who it thinks have "a realistic chance of winning."

B. AETN Had No Compelling Interest in Excluding Forbes from its Debate

AETN has experimented with different theories of compelling interest in this case. Its early theories closely reflected its actual reasons for excluding Forbes—to give more time to the two Democratic and Republican candidates and to prevent Forbes from receiving the same "status" and "legitimacy" they would be receiving.[6] Presumably because these reasons are viewpoint-discriminatory,[7] they have been dropped in Petitioner's Brief and

[6] Petitioner has argued that "Mr. Forbes' participation would reduce the time available for debate between the two candidates in whose campaigns, and views, the public was interested." Pet. for Writ of Cert. at 15. It has also invoked an interest in not "giv[ing] Forbes a status" and an "implied . . . degree of legitimacy for his candidacy, that he had not earned on the campaign trail." *Id.* (citing Tr. Trans. at 201-02, 208).

[7] Transferring the debate-time of lesser known, lesser financed or less popular candidates to more established candidates is the very antithesis of the First Amendment: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (citations omitted).

AETN's interest in not extending undue "status" and "legitimacy" to Forbes is dressed-up viewpoint discrimination. AETN admits that its debate confers political "status" and "legitimacy" but states that it wants to preserve these benefits for the Democratic and Republican candidates "in whose campaigns, and views, the public [is] interested." Pet. for Writ of Cert. at 15. AETN never actually did a study to determine whether the public was in fact interested in Forbes' views—or, for that matter, the views of the other candidates. It simply "concluded that the people of Arkansas 'did not want to hear' from Mr. Forbes" and were only "interested" in the views of the candidates AETN assumed they were going to vote for. This is a dubious assumption. Many voters know the views of the established parties and are interested in, and open to, the views of minor party and Independent candidates even if they do not presently plan to cast votes for them. For example, in the 1996 presidential campaign, a huge majority of voters supported including amicus Ross Perot and his running mate Pat Choate in the presidential

replaced by two perfectly respectable interests that have nothing to do with the actual decision to exclude Forbes.

One theory offered is that AETN has a compelling interest "to operate the Network in conformity with the FCC's licensing requirements." Br. for Pet. at 37. AETN actually suggests that allowing Forbes to debate would "cause Arkansas to give up [control over all of its programming], placing its qualifications as a licensee in jeopardy." *Id.* at 38. Aside from the absurdity of suggesting that allowing a third candidate to join its debate would mean surrendering "control over all of its programming," there is absolutely nothing in the record or in federal law to support the proposition that AETN's license would have been "in jeopardy" if it had allowed Forbes to debate. In effect, AETN is arguing that federal law or the FCC somehow *compelled* it to exclude Forbes, which is preposterous.

The other theory advanced by AETN is that it "has a compelling interest to provide the special educational, cultural and informational programming on public television that is not otherwise available to

debates despite the fact that most voters ended up casting their ballots for their opponents. *See Perot Should be Part of the '96 Debates*, S. F. Chron., Sept. 16, 1996, at A20 (reporting Harris Poll finding that 76% of the public said Perot should be invited to debate and ABC News poll finding that 63% wanted him in). Moreover, *Amicus* CPD lost some 100 million debate viewers between 1992, when Perot was allowed to debate his Democratic and Republican rivals, and 1996, when CPD excluded him. *See* John Carmody, *The TV Column*, Wash. Post, Oct. 18, 1996, at D4. Many voters instinctively grasp that "political figures outside the two major parties have been fertile sources for new ideas and new programs" and that "many of their challenges to the status quo have in time made their way into the political mainstream." *Anderson v. Celebrezze*, 460 US 780, 793 (1983) (citations omitted).

But even if AETN had reason to believe that only a minority of voters were "interested" in Forbes' views, it is still the essence of First Amendment discrimination to exclude him for that reason. Withholding government benefits from the champions of unpopular, unfamiliar or even obscure viewpoints is not a valid societal interest. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . . One's rights to . . . free speech . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.").

the public." *Id.* at 36. Stated at this level of abstraction, the interest is wholly unobjectionable. But what does it have to do with excluding Forbes? Is it AETN's suggestion that every other candidates' debate in the Third District included all three candidates so the "special" mission of Arkansas public television was to provide a two-person debate "not otherwise available to the public?" Surely the opposite is true: If any "special . . . informational programming" is needed by the voting "public" in an election, it is a debate in which all candidates on the ballot have a chance to appear and make their best case. After all, *private* debate sponsors like *Amicus* CPD operate on the theory that they have a First Amendment right to exclude everyone from their debates but Democratic and Republican candidates. *See* Br. of *Amicus Curiae* CPD at 6-7. Given the rampant partisan discrimination of private debate sponsors, the distinctive role of public media is to serve the entire public, including the estimated 20 percent of American voters registered as Independents or as supporters of minor political parties.[8]

There was no public interest in excluding Forbes, much less a compelling one, and in any event, it is abundantly clear that there were far less speech-restrictive alternatives available.[9]

[8] Twenty-seven states and the District of Columbia have electoral systems where voters register as members of a particular party. Of these, 46.7 percent are registered Democrats, 33.8 percent are registered Republicans, 20.5 percent are registered Independents, or miscellaneous, or other third party members. Ballot Access News at 5 (Richard Winger ed., Dec. 12, 1996). Voter registration figures actually understate non-major party preferences because many people register with the major parties simply in order to vote in primary elections. *See infra* note 24.

[9] Even if AETN had a compelling interest in favoring the Democrat and Republican with more time, it could have lengthened the time of its debate or simply added a second debate. If time was so scarce on the network that only two candidates could debate, AETN could have drawn names out of a hat and excluded one of the three qualified candidates at random. *See Rosenberger* at 30 ("government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity" and declaring it "incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle[.]").

Similarly, if AETN feared that it might confer on Forbes unwarranted "status" and "legitimacy," it could have broadcast a disclaimer at the start of the show,

II. AS APPLIED BY AETN AND ON ITS FACE, THE SCREEN OF POLITICAL VIABILITY IS VIEWPOINT-DISCRIMINATORY

Whether or not its debate was a limited public forum, AETN could not, as a state actor, discriminate against a qualified congressional candidate on the putative grounds of his "viability" or "seriousness" because such a standard, both as applied here and on its face, discriminates on the basis of political viewpoint.[10] *See Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 804 (1985) (any viewpoint discrimination by government is categorically invalid, regardless of what type of forum exists). AETN applied its viability test in a plainly discriminatory fashion. It subjected minor party candidates to the test but not the Democratic and Republican candidates, no matter how hopeless their electoral prospects. Moreover, viability or "newsworthiness," in AETN's current formulation, are intrinsically viewpoint-specific criteria for choosing candidates to participate in debate because they discriminate on the basis of political popularity.[11]

like the ones that appear at airports regarding religious proselytizers on the premises. The disclaimer could have read: "Because of the requirements of the First Amendment, AETN has invited all three qualified candidates for Congress in the Third Congressional District to debate. This debate is intended to allow the public to hear the candidates on the ballot and make an informed choice, but is in no way meant to confer any undue status or legitimacy by the government on any of the candidates."

[10] AETN appears to have used an unwritten and vague test of political "viability," *see Forbes v. Arkansas Educ. Television Comm'n*, 93 F. 3d 497, 500 (8th Cir. 1996), "seriousness," see Br. for Pet. at 16 ("Ms. Oliver concluded that Mr. Forbes was not a 'serious candidate'"), or, now the favored formulation in the Petitioner's Brief, "newsworthiness." *Id.* at 27. Whatever term AETN now claims to have been interpreting, nowhere did it define by regulation or policy what any of these terms mean or what its test or process actually was. Nor did AETN give Forbes an opportunity to prove his viability or to appeal AETN's findings. Without any opportunity to make his case or to see, much less rebut, evidence of his non-seriousness, Forbes was simply rejected by government officials who consulted, without any policy guidelines, a handful of associates "to get an assessment of how politicians and knowledgeable political observers in Arkansas viewed Mr. Forbes." *Id.* at 15. Respect for due process is so foreign in this context that AETN did not even tell Forbes that it was sponsoring a debate among candidates in his district. (He found out about it by accident.) These conditions are unacceptable for protection of our most precious political freedoms. *See Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988) (stating that the "danger" of "content and viewpoint censorship" is "at its zenith when the determination of who may speak and who may not is left to the unbridled decision of a government official.").

A. AETN's Vague Test of Political Viability Was a Pretext for Political Viewpoint Discrimination Because it Was Not Used to Screen Out Republican or Democratic Candidates Who Had No Chance of Winning

As applied in this case, viability (or any of its euphemisms) operated as political pretext rather than neutral regulatory standard. As Petitioner candidly put it, "AETN made the editorial decision to invite to each debate *only the Republican and Democratic candidates*." Pet. for Writ of Cert. at 2 (emphasis added). Yet AETN made this decision to invite all the Republican and Democratic candidates without considering the political viability of any of them.

The debate AETN sponsored in the First District vividly illustrates the double standard at work. The First District of Arkansas is one of the most Democratic districts in the country and has not sent a Republican Representative to the House since 1868. *Congressional Quarterly's Guide to U.S. Elections* 978-1321 (John L. Moore ed., 3d ed. 1994). In the eight elections prior to 1992, the Democratic candidate received 68.9%, 100%, 100%, 64.8%, 97.2%, 64.2%, 100%, and 64.3% of the general election vote. *Id.* at 1279-1315. The Republican candidate, Terry Hayes, raised only $38,015 compared to the Democrat's $439,343, and so was outspent

[11] As if conceding that it is an illegitimate test for debate participation, AETN now struggles to undermine the Eighth Circuit's conclusion that AETN excluded Forbes because of considerations of his "political viability." *See* Br. for the Pet. at 32-33. It concedes that Forbes' chances of election "were one factor" in its decision, but asserts that there was "far more," yet then proceeds to list six factors that are all indicators of Forbes' political viability: the level of the public's interest in his campaign, the level of news coverage, the extent of his campaign organization, his prior electoral performance, his fund-raising success, and the extent of his public appearances. *Id.* Why would AETN look to any of these "factors" except to determine whether or not Forbes was electorally viable?

better than 11-1. Federal Election Commission Financial Data for House General Election Campaigns Through Dec. 31, 1992, at 22. If we adopt AETN's apparent definition of viability as likelihood of winning the election, the Republican was simply never viable. In the final tally in 1992, Democrat Blanche Lambert, a 31-year old former staff aide in the office of the prior Democratic incumbent, received 69.8% of the vote in her first election compared to 30.2% for Hayes. *See* Clerk of the U.S. House of Representatives, *Statistics of the Presidential and Congressional Election of Nov. 3, 1992*, at 5 (1993). In this district where Democrats outnumber Republicans nearly 3 to 1, the Republican never had a prayer and yet was invited to debate without passing any test of seriousness at all.[12]

A similar story can be told about the Second Congressional District debate, to which AETN invited not only the "popular incumbent," Democratic Congressman Ray Thornton, but "long-shot Republican challenger Dennis Scott," who "filed at the last minute to run, saying ['Ino incumbent should get a free ride.']"[13] Scott had never before held public office and, despite his Republican credentials, raised only $5,724—less than what was raised by Forbes, who collected $9,754. Federal Election Commission Financial Data for House General Elections Campaigns Through Dec. 31, 1992 at 22.[14] Congressman Thornton was overwhelmingly favored to defeat Scott in this strongly Democratic district. In the 1990 election, he captured 60.4% of the

[12] *1992 Election Preview, House: Arkansas*, Cong. Q. Wkly Rep., 3366-67, Oct. 24, 1992.

[13] *Governor's Run for White House Heads Arkansas' Slate on Nov. 3*, The Associated Press, Oct. 24, 1992, *available in* 1992 WL 5148815.

[14] Beyond the obvious double standard at work, it is unconstitutional to use wealth or fundraising capacity as a classification to disadvantage voters and candidates. *See Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Morse v. Virginia*, 116 S. Ct. 1186, 1189 (1996). There is also no record of Scott having a campaign office outside of his home, but AETN used this same fact to penalize Forbes. *See* Br. for Pet. at 15. Of course this snobbish standard, if enacted by the Arkansas legislature as a criterion for ballot or debate access, would be unconstitutional. Ralph Forbes had as much right as Steve Forbes or John F. Kennedy to run his campaign out of his home without being penalized by government. *See* Theodore Sorenson, *Kennedy* 171-172 (1965) (discussing John F. Kennedy's use of his homes in Hyannisport and Palm Beach as the base of his presidential campaign).

vote and then increased his share in 1992, beating Scott by 74.2% to 25.8%, a landslide seemingly disproving any claim that Scott was ever viable in AETN's terms. It is unlikely that any Republican or Independent could have been "viable" given the history of this district in which the prior Democratic incumbent, Rep. Tommy Robinson, achieved victory margins of 85.8% in 1986 and 83.5% in 1988. *Id.* Had he been an Independent or third party candidate, Dennis Scott simply would never have been invited to debate.

Even if AETN's standard of viability were to be neutrally applied in Arkansas or any other state, there would be precious few debates because candidates challenging incumbents are rarely "viable" in the sense of having a "realistic" possibility of victory. The incumbent reelection rate is higher than 93%, and the vast majority of House districts can be reliably assigned to either the Democratic or Republican columns (or Independent in Vermont). *See* Norman J. Ornstein et. al., *Vital Statistics on Congress, 1995-1996*, at 60 (1996) (calculation based on statistics from 1976-1996, inclusively). "More than five out of six incumbents won in every election since 1954, including over 98% of incumbents in 1968, 1986, and 1988." *Dubious Democracy: United States House of Representatives Elections 1982-1994*, at 5, The Center for Voting and Democracy, Aug. 1996. Even in 1994, a good year for challengers, 91% of incumbents were returned to office. *Id.* Most importantly, the vast majority of House races are won every election by a victory margin over 20%, which is "the traditional definition of a political landslide." *See id.* at 3-4. Every House election in Arkansas between 1986 and 1990 was won by a landslide. *Id.* at 19. Thus, most Democratic and Republican challengers are simply never "viable;" they lose by a landslide against an incumbent of the district's majority party.[15]

[15] The same can be said of many Democratic and Republican presidential candidates, like George McGovern in 1972 or Barry Goldwater in 1964, both of whom were widely believed never to have any chance at all. In 1996, the election year when Ross Perot was deemed not "viable" and excluded by *Amicus* CPD, Republican nominee Bob Dole was for months described by the Beltway Establishment as "toast," *see Media Notes*, Wash. Post, Oct. 28, 1996, at D1 and his campaign "dead meat." *See Behind Closed Doors*, The Indianapolis Star, Sept. 29 1996, at B3. *See also Media Notes, supra*, (quoting Albert Hunt, "This

Political party affiliation cannot validly be treated as a proxy for electoral viability in Arkansas (or anywhere else).[16] AETN thus practiced a blatantly discriminatory policy. All Democratic and Republican nominees were invited to debate, whether or not they were politically viable or newsworthy. All *other* candidates were subjected to AETN's vague and unwritten test. This procedure is the essence of partisan-based viewpoint discrimination.

B. Government Has No Power to Label Qualified Candidates as Likely Winners and Losers in a Forthcoming Election or to Award Important Political Benefits on that Basis

Even if it were to apply its vague standard in a non-partisan way, a government actor has no right to name winners or losers in a forthcoming public election, communicate its predictions to the electorate, or selectively favor certain candidates with free publicity and a stamp of implied government approval. The government's proper role is to regulate access to the ballot to assure the seriousness of certified candidates, to offer a public forum to *all* qualified candidates if it wants to sponsor a debate, and, finally, to count the ballots. All candidates must be treated equally regardless of their

election has been over at least since August," Jack Germond: "It's been over for five months," Sam Donaldson: "This election was over last February."). Yet, the politically-skewed viability standard in practice always presumes that nominees of the Democratic and Republican parties are, by definition, "viable" no matter how hopeless political observers consider their chances.

[16] In some states, Independents are incumbents, and Democrats and Republicans long-shots. For example, Vermont has sent Independent Bernie Sanders as its at-large Representative to the U.S. House for the last three elections, and the Democrats have rarely fielded an opponent. *See, e.g.*, Clerk of the U.S. House of Representatives, *Statistics of the Presidential and Congressional Election of Nov. 3, 1992*, at 73 (1993) (no Democratic challenger), Clerk of the U.S. House of Representatives, *Statistics of the Congressional Election of Nov. 8, 1994*, at 41 (1995) (no Democratic challenger).

wealth or social standing, and government may not play favorites in elections.[17]

By pronouncing candidates viable or non-viable and advertising these designations to the electorate, government pastes political gold stars or scarlet letters on citizens running for office. Yet by setting itself up to affirm or reject the credibility of candidates, government usurps the role of the electorate. If "there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics[.]" *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).[18] The official designation of non-viability becomes a self-fulfilling prophecy.

Even if it were constitutional, government has no expertise to make such predictions. Because we have a secret ballot, declaring candidates electable or not is guesswork, and the history of politics is filled with great surprises.[19] The only method politicians and media have of predicting results is polling, but polls can fluctuate and are anticipatory. If AETN had sponsored a debate for candidates in the U.S. Senate Democratic primary in Wisconsin in 1992, it would have excluded the eventual winner of the election, Russ Feingold, because a major poll showed him at 10% of the vote compared to 42% for

[17] James Madison asked, "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people." The Federalist No. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961).

[18] *See also Denver Area Educational Telecom. Consortium v. FCC*, 116 S. Ct. 2374, 2405 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). ("In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse; it removes 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.'").

[19] The Eighth Circuit was right to find that "political viability" is "so susceptible of variation in individual opinion" as to "provide no secure basis for the exercise of governmental power consistent with the First Amendment." *Forbes v. Arkansas Educ. Television Comm'n*, 93 F. 3d 497, 504 (8th Cir. 1996). The whole point of a political campaign period is to allow candidates—through popular appeals, organizing, and debates—to change public opinion.

Congressman Jim Moody and 40% for businessman Joe Checota. *See Moody and Checota in Close Race for Senate Nomination*, Milwaukee J., Aug. 16, 1992, at A1. Yet Feingold went on to overcome his rivals less than three weeks after this poll was taken, collecting 69% of the vote to 14% each for Moody and Checota, *see Landslide for Feingold*, Milwaukee Sentinel, Sept. 9, 1992, at 1A, and then went on to defeat the incumbent Republican Senator, Bob Kasten, in the general election.[20]

If government cannot affix descriptions of "viable" or "non-viable" to candidate names on the ballot, it should not be allowed to do that to the candidates themselves during the campaign. AETN's self-appointed political gatekeeping function distorts its legitimate role in democracy.[21]

C. Elections Serve Purposes Broader than Certifying the Candidate With the Most Votes

By defining elections only in terms of who appears likely to collect the most votes and suppressing the voices of others, government chokes off important avenues of political expression and future political development.

An election campaign is more than a numerical and mechanical contest over who will take office when the election is over. It is also democracy's way of promoting robust political debate among citizens and allowing candidates and parties to inject new ideas and

[20] To take another example, public opinion polls showed that Tennessee Republican Senate candidate Bill Frist "would lose by a 53-28 percent margin" to Senator Jim Sasser in 1994, *see* Phil West, *Cooper and Sasser Likely Wins in Senate, Poll Finds*, Associated Press, The Memphis Comm. Appeal, July 28, 1994, at A13, but he ended up beating him 56% to 42%. *See* Clerk of the U.S. House of Representatives, *Statistics of the Congressional Election of Nov. 8, 1994*, at 37 (1995).

[21] "There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

messages into popular discussion in order to influence the public agenda. *See, e.g., Illinois Elections Bd. v. Socialist Workers' Party*, 440 U.S. 173, 186 (1979) ("[An] election campaign is a means of disseminating ideas as well as attaining political office."); J. David Gillespie, *Politics at the Periphery*, 27 (1993) (showing how advocacy of woman suffrage and a progressive income tax in the early 1900s by losing Socialist Party candidates led to enactment of the Sixteenth and Nineteenth Amendments); Tom Morgenthau, *Citizen Perot*, Newsweek, Nov. 9, 1992, at 23 (before Perot reentered the 1992 presidential campaign, "there was little or no sign that George Bush and Bill Clinton were prepared to discuss [the] primal issues" of deficit reduction and generational equity, but Perot's candidacy made deficit reduction a central issue in the campaign).

Candidates often run to establish legitimacy for their politics and to position themselves for a future race. For example, after participating in a series of famous debates in Illinois in 1858, Abraham Lincoln lost to Stephen Douglas in his bid for U.S. Senate. But Lincoln went on to win the presidency two years later largely based on his extraordinary debate performance and the political views he espoused while clashing with Douglas.[22] Candidates also run to influence the outcome of the election even if they cannot win it. *See Gillespie, supra*, at 108-09 (explaining how George Wallace was able to deny a popular vote majority to either Republican Richard Nixon

[22] *See* Harold Holzer, *The Lincoln-Douglas Debates* 24 (1993) (noting the pervasive belief that "Lincoln shrewdly used the debates mainly to position himself for the presidency two years later."). Many politicians have suffered multiple losses before finding ultimate success with voters. For example, Robert Casey "made a second career out of running for Governor" in Pennsylvania, where over the course of 20 years from 1966 to 1986, he continuously ran and lost for the Democratic Nomination before finally winning in 1986. He narrowly won in the general election, and was reelected to a second term in 1990 with 68 percent of the vote. *See* Michael deCourcy Hinds, *A Victory Over Illness Plays Well in Politics*, N.Y. Times, Feb. 20, 1994, at A18. *See also* Michael deCourcy Hinds, *The 1992 Campaign: Pennsylvania*, New York Times, Feb. 21, 1992, at A15 (noting Arlen Specter's unsuccessful bid for mayor in 1967, his loss in his reelection campaign for District Attorney of Philadelphia, and his back-to-back losses in the 1976 Senate primary and the 1978 gubernatorial primary before succeeding in his bid for Senate in 1980).

or Democrat Hubert Humphrey, sending a national message). Sometimes a defeat can propel a candidate's political career, such as was the case in Arkansas's Third Congressional District in 1974, when Bill Clinton lost his race for the House, but then went on to be elected Attorney General of Arkansas two years later. *See* Michael Kelly, *The President's Past*, N.Y. Times, July 31, 1994, at F20.

Given declining party allegiance in modern American politics,[23] and the increased interest in new parties and Independent candidacies,[24] third party candidates today can affect electoral outcomes decisively. In the most recent race for the House of Representatives, a special election in the heavily Democratic Third Congressional District of New Mexico, a Green Party candidate received 17% of the vote, which was widely identified as the reason the Democratic nominee, with 40%, lost to the Republican, who won with 42%. *New Mexico 3rd District Voters Choose Republican in Upset*, Associated Press, May 14, 1997, *available in* 1997 WL 2524964, (citing as a "key factor" the presence of the Green Party candidate and "how strongly she attracted support from Democrats"). This result may influence the positions taken by Democratic and Republican candidates in New Mexico on the environmental and health issues raised by the Green Party. In 1994, no less than 18

[23] *See* Gordon Black, *The End of the Two Party Era?*, Polling Report, Sept. 18, 1995. ("The two parties have today lost the firm allegiance of a majority of the American electorate. Nearly 40% of the electorate is fully Independent in its preferences and less than 30% is strongly attached to either of the two parties combined."); Emmet T. Flood and William G. Mayer, *Third-Party and Independent Candidates: How They Get on the Ballot, How They Get Nominated*, in *In Pursuit of the White House* 317 (William G. Mayer ed., 1995) (noting "long-term decay of party allegiances within the national electorate.").

[24] *See* John C. Berg, *Cracks in the U.S. Two-Party System*, at 41, Suffolk University, Presented at the Annual Meeting of the New England Political Science Association, May 3-4, 1996 (showing rapidly growing numbers of Independent and minor party House candidates placing second in general elections and receiving more than 5 percent of the vote); *Third Party Prospects*, CQ Research, Congressional Quarterly, Inc., Dec. 22, 1995, at 1139 ("The disposition to vote for an Independent candidate is higher than it has ever been in the past. While it is difficult to make the choice, it is getting easier," quoting Andrew Kohut, Director of Times Mirror Center for the People and the Press.)

Independents and minor party candidates captured more votes than the margin of victory between the major party candidates.[25]

It is very possible that, had Forbes been allowed to debate by AETN, he would have changed the outcome of the Third District race. The narrow Republican victor, Tim Hutchinson, received 125,295 votes or 50.2% of the total, compared to Democrat John VanWinkle, who received 117,775, or 47.2%. Clerk of the U.S. House of Representatives, *Statistics of the Presidential and Congressional Election of November 3, 1992*, at 5 (1993). Meanwhile, Forbes captured 6,329 votes or 2.5%. *Id.* If Forbes, who describes himself as a strong conservative, had been allowed to debate and had been able to convert just one out of every fifteen of Hutchinson's eventual voters, then the election would have gone to Van Winkle. This, too, would have sent a clear political message. Forbes posed a serious threat to the Republican candidate in the race given that Forbes had captured more than 46 percent of the vote in the 1990 Republican lieutenant governor's primary race, *See* David S. Broder, *A Close Governor's Race in Arkansas?*, Wash. Post, May 31, 1990, at A10, sweeping fifteen of sixteen counties in the Third District.[26] *See* Joint Append. at 171.

[25] *Id.*

[26] To be sure, some people dislike minor party candidates playing a "spoiler" role, but then they do not have to vote for them. And while some may favor a "two-party" system, there is nothing in the Constitution requiring that the two parties be the Democrats and Republicans. The Court has already made clear that minor party candidates have an equal right to run. *See, e.g., Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1367 (1997) (interest in political stability "does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence") (citations omitted); *Anderson v. Celebrezze*, 460 U.S. 780, 802 (1983) ("protecting the Republican and Democratic Parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena"); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.") In any event, objections to "spoiler" candidacies are clearly based on how important they might be—not how irrelevant they are.

D. Ballot Access Regulation is the State's Mechanism for Objectively Establishing Candidate Seriousness and State Actors May Not Add to These Requirements in an *Ad Hoc* and Subjective Way to Disfavor Candidates Representing Unpopular Views

Ballot access laws are the state's legitimate and objective way of screening out frivolous candidates and guaranteeing the seriousness of candidates who achieve a place on the ballot. *See Anderson* at 788 n.9 ("The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates."). These laws embody the state legislature's decision about what level of demonstrated public support and interest is required before a candidate will be deemed serious enough to be certified and placed on the ballot.

In almost every instance, obtaining ballot access (for all candidates but Democrats and Republicans) requires compliance with a labyrinth of regulations and the collection of thousands of individual signatures in an arduous, expensive, time consuming and frequently demoralizing process.[27] A third party today needs to gather more than 1.6 million signatures to qualify candidates in all 435 House districts. *See Third Party Prospects*, CQ Research, Congressional Quarterly, Inc., Dec. 22, 1995, at 1139. In Florida a third party candidate for U.S. Senate needs to collect 196,788 signatures and a House candidate 10,000. *Id.* Thus, the grueling character of state ballot access regulation experienced by Forbes and his volunteers in Arkansas was typical. *See* Joint Append. at 84 ("So it takes 10, 12 hours a day to get even a few hundred signatures . . . . There was a lot of obstacles. It was not an easy task.") (testimony of Ralph Forbes).

[27] *See* Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and Ballot Access for Independent Candidates*, 7 BYU J. of Pub. Law 281, 288 (1993) (discussing the high threshold for ballot access in elections); Flood & Mayer *supra* note 23, at 305 (getting on the ballot "is never an easy undertaking").

Despite the hardships imposed by ballot access laws, such laws provide for objective tests of candidate seriousness. They require collection of a finite number of signatures from real citizens, a test that all candidates understand, that measures seriousness with precise numbers, and that the government can readily certify a candidate as having passed or failed. The signature requirement is clear and amenable to neutral application.

But AETN officials placed extra burdens on Forbes by imposing on him an *ad hoc* and subjective test of his viability as a candidate. Because the State of Arkansas had already certified Forbes' objective seriousness by placing him on the ballot, AETN's test was focused not on his *seriousness*, but on its subjective perceptions of his *popularity*.

When AETN declared Forbes not viable, it meant that he was not popular and had little chance to win.[28] But the First Amendment protects equally the political speech of popular and unpopular citizens, people with maintream views and extreme views. *See Texas v. Johnson* 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of a idea simply because society finds the idea itself offensive or disagreeable.") (citations omitted). This principle "has its fullest and most urgent application precisely to the conduct of campaigns for politial office." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).[29] If AETN's popularity standard were used to

[28] *See* Joint Append. at 119 ("He didn't have popular support and didn't have a chance to win the election.") (Testimony of Susan Howarth).

[29] It is minor party candidates and Independents who will generally be excluded on the grounds that they are not viable. Yet this circular system ensures self-perpetuating rule by the Democrats and Republicans, a constitutionally disfavored result. *See Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) ("[T]he primary values protected by the First Amendment . . . are served when election campaigns are not monopolized by the existing political parties."); *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957) ("All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately

determine candidate access to the ballot itself, it would be obviously viewpoint-discriminatory.

However, AETN points to the jury finding that Forbes was not excluded because of any political or personal animosity against him in order to argue that his exclusion on the grounds of viability was viewpoint-neutral. Yet, this is a *non-sequitur*. The test of First Amendment viewpoint neutrality is an objective test that focuses on the nature of a governmental classification that treats two classes of speakers differently. *See generally Rosenberger v. Rectors and Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995). It is not a subjective test that focuses on the intentions or motivations of specific government actors in suppressing a particular person's speech.[30]

The University of Virginia bore no malice or ill will towards religious students or their views, but when it declined to give the same speech privileges to religious student publications as it did secular student publications, the Court found its policy to be viewpoint-discriminatory. *See id.* Similarly, there was absolutely nothing in the record before the Court in *Lamb's Chapel* to suggest that the Center Moriches school system had personal or political hostility towards the religious groups that it was excluding from use of its facilities, but again the Court found the practice viewpoint-discriminatory. *See Lamb's Chapel v. Moriches*, 508 U.S. 384 (1993).

Regardless of the fact that there was no bureaucratic animus against him as a person, the whole purpose and effect of excluding Forbes was to block out presentation of a political viewpoint deemed unpopular by a candidate deemed unpopular. This is the essence of viewpoint discrimination. Nor does the fact that it would exclude unpopular candidates of both right-wing and left-wing views rescue AETN's policy. *See Rosenberger*, 115 S. Ct. at 2518 ("The dissent's declaration that debate is not skewed so long as multiple voices

accepted. Mere unorthodoxy or dissent from prevailing mores is not to be condemned.").

[30] Petitioner's mistake, and the trial judge's confusion on this point, is understandable since subjective animus is often *evidence* of objective viewpoint discrimination, but it is not a necessary factual predicate in order for it to exist as a matter of law.

are silenced is simply wrong; the debate is skewed in multiple ways.").

III. BASED ON EMPIRICAL EVIDENCE, THERE IS NO BASIS FOR THE CLAIM THAT BALLOT-CERTIFIED INDEPENDENT AND MINOR PARTY CANDIDATES WILL OVERWHELM GOVERNMENT DEBATE SPONSORS

Petitioner argues that taking away the viability filter from debate sponsors will cause huge numbers of candidates to flood debates and "public broadasters would abandon the effort." Br. for the Pet. at 29. This is a farfetched scenario and tired canard.

In Arkansas's four congressional districts in 1992, Forbes was the only Independent or minor party candidate running, a sitation far more reflective of our political culture than AETN's hyperbolic forecast. In the last 25 general elections for the U.S. House of Representatives, there have been on average only 75 Independent or minor party candidates running in America's 435 congressional districts.[31] Thus, over the last fifty years, on average fewer than one out of five congressional districts has seen even *one* Independent or minor party candidate on the ballot at election time.[32] The idea that government debate sponsors could not handle non-major party candidates is preposterous.[33]

[31] This figure, along with all the others, was calculated from election returns reported in Congressional Quarterly Almanac and Congressional Quarterly Weekly Report for each of the respective election years from 1948 to 1996.

[32] *Id.* Even if we look at just the last ten years, a period of growth in minor party activity, Petitioner's parade of horribles looks silly. In 1986, there were 91 Independents or minor party candidates; in 1988, there were 154; in 1990, there were 170; in 1992, there were 458; in 1994, there were 256; and in 1996, the peak year this century for minor party House candidacies, there were 487, or just barely more than one per district on average. *Id.*

[33] *Amicus* CPD makes a similar argument that presidential debates would become less manageable if the lock of the two-party system were broken. *See* Br. of *Amicus Curiae* CPD at 4. But in 1996, only three presidential candidates were eligible to receive public funding in the general election, which is the only federal statutory definition of seriousness we have. *See* Ron Scherer, *The Perot Factor: Maverick May Mine Voter Discontent*, The Christian Sci. Monitor, Aug. 20, 1996, at 3 (noting

The idea that non-discriminatory debates would become circuses is implausible, since nationally-televised debates in Democratic and Republican presidential primaries have regularly featured many more than two candidates.[34] Moreover, the suggestion that major party candidates would pull out of debates if others were allowed to participate is both false, as shown by the three-way 1992 presidential debates in which Perot was included, and pernicious, since the CPD is effectively arguing that an anticipatory heckler's veto should be extended to the two major parties.

If the Democratic and Republican candidates in the Third District wanted to debate without Forbes being present, they had every First Amendment right to arrange a private meeting of their own. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). But AETN had no right to set up and pay for a private debate between them and exclude Forbes, who had met every requirement of candidate seriousness set by Arkansas and possessed an equal claim to be a speaker in the government's candidate forum.

Perot, Clinton and Dole's receipt of federal campaign funds). In addition, only four presidential candidates secured ballot status in all 50 states and the District of Columbia, *see* Mimi Hall, *Not to Forget the 18 Other Candidates*, USA Today, Nov. 5, 1996, at 8A, and only six candidates made it onto the ballot in sufficient states to theoretically be able to collect a majority of votes in the electoral college. *See* Donald P. Baker, *Third-Party 'Musketeers' Duel on TV*, Wash. Post, Oct. 23, 1996, at A20. If a government broadcaster were to sponsor a presidential debate (none presently do), it would have any of these stringent, yet viewpoint-neutral, tests available to it.

[34] *See, e.g.*, Bill Lambrecht, *The Democratic Presidential Hopefuls to Use Debate to Kick Off Campaign*, St. Louis Post-Dispatch, Dec. 14, 1991, at 1B (six candidates in Democratic primary debate, including Bob Kerrey, Jerry Brown, Bill Clinton, Tom Harkin, Paul Tsongas and Douglas Wilder), Lloyd Grove, *GOP Presidential Hopefuls Prepare for Premiere Debate*, Wash. Post, Oct. 27, 1987, at A5 (six candidates in Republican primary debate, including George Bush, Pete du Pont IV, Alexander Haig, Jr., Bob Dole, Pat Robertson and Jack Kemp).

CONCLUSION

For the foregoing reasons, *Amicus* Perot '96 respectfully urges the Court to affirm the decision of the Eighth Circuit in *Forbes*.

Respectfully Submitted,

Jamin B. Raskin
Counsel of Record
American University
Washington College of Law
4801 Massachusetts Avenue, N.W
Suite 442
Washingon, DC 20016-8181
(202) 274-4011

R. Clayton Mulford
General Counsel, Perot '96
Hughes & Luce, L.L.P.
1717 Main Street, Suite 2800
Dallas, TX 75201
(214) 939-5500

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Attorneys for *Amicus Curiae* Perot '96

AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

—v.—

RALPH FORBES,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ARKANSAS IN SUPPORT OF RESPONDENT

Marjorie Heins
(*Counsel of Record*)
Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to defending the constitutional rights and liberties enshrined in the Bill of Rights. The ACLU of Arkansas is one of its statewide affiliates.

This case implicates two principles that have been central to the ACLU since its founding in 1920: the general free speech right of journalists to make editorial decisions, and the obligation of government not to discriminate against nonmainstream political candidates. *Amici* submit this brief because we believe that the proper resolution of this case must take into account both of these fundamental constitutional principles.

STATEMENT OF THE CASE

Ralph Forbes filed suit in October 1992 against the Arkansas Educational Television Commission (AETC), the Arkansas Educational Television Network (AETN), and other groups, challenging on First Amendment grounds their decision to exclude him from a televised debate among candidates for Congress in the Third District of Arkansas.[2]

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Forbes also sued the members and officers of AETN, and then-Governor Clinton. In addition to his First Amendment claims, he alleged violation of the political campaign equal-access law, 47 U.S.C. §315(a), an issue that the courts did not address since they found that

(continued...)

Forbes had submitted sufficient signatures to qualify for the ballot, and was the only ballot-qualified candidate in the race other than the major party Republican and Democratic nominees.

AETN is a state-owned and operated television network created by Arkansas law, Ark.Stat.Ann. §6-3-101, *et seq.*, for the purpose of developing and enhancing public education, and making its benefits available to the people of Arkansas. *See* Ark.Stat.Ann. §6-3-105(a); note to §6-3-101. The network is governed by the AETC, which has the statutory power to "control[] and supervis[e] the use of channels reserved by the Federal Communications Commission to Arkansas for noncommercial educational use," to "designate the location of stations to utilize such channels," and to "make rules and regulations governing the operation of these stations and the programs televised over these channels." §6-3-105(c), (d). All of the commissioners of the AETC are appointed by the governor with the advice and consent of the Senate for terms of eight years. §6-3-102(b)(1). AETN's Programming Policy recognizes the network's status as a state agency that must, for example, "observe[] the constitutional principle of separation of church and state." Appendix J to Petition for Writ of *Certiorari* at 99a (Cert.App.).

Although a state agency, AETN is not simply a mouthpiece for the ideas and viewpoints of the government of Arkansas. According to its Programming Policy, "AETN maintains public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources." Cert. App. at 98a. It subscribes to the "Statement of Principles of Editorial Integrity in Public Broadcasting," *id.* at 99a, developed at the Wingspread Conference on Editorial Integrity in 1985, which emphasizes the importance of protecting all public broadcasters from "extraneous interference and control," as well as fostering "journalistic objectivity" and "a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." *Id.* at 68a, 69a.

AETN's Programming Policy also stresses the network's obligation to "further[] the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens/voters to make informed judgments about the issues of our time." *Id.* at 100a. It adds: "In matters of public importance that may be controversial, special attention is invested to assure fairness in treatment of different points of view." *Id.*

Nevertheless, in September 1992, AETN denied Forbes' request to be included in the Third District candidates' debate which it had scheduled for October 22nd. Its reason, according to its executive director, was that AETN had "made a bona fide journalistic judgement that our viewers would be best served by limiting the debate to elected nominees of the two major parties." *Id.* at 103a. AETN then promoted the debate with an advertisement that said:

> Do you know your candidate? Get better acquainted with the candidates and the issues. Democrat John Van Winkle of Fort Smith and Republican Tim Hutchinson of Bentonville debate the issues as they campaign for the Third

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[2] (...continued)
§315(a) did not create a private right of action. *See Forbes v. Arkansas Educational Television Network Found.*, 22 F.3d 1423 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 500 (petition of AETC); 115 S.Ct. 1962 (1995) (petition of Forbes). In November 1992, he amended his complaint to challenge the decision of two private networks not to air one of his anti-abortion advertisements except during "safe harbor" hours. 22 F.3d at 1427. Only the First Amendment issue is now before this Court.

Congressional District seat, live tonight at 7:00, AETN, where learning never ends.

Joint Appendix (J.A.) at 135.

Forbes then filed suit and moved for a preliminary injunction ordering his inclusion in the October 22nd debate. The district court denied his motion, relying on the then-governing Eighth Circuit precedent of *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), which had rejected a political candidate's First Amendment claim of access to a televised campaign debate sponsored by a government broadcaster. *See Forbes v. Arkansas Educational Television Network Found.* (*Forbes I*), 22 F.3d 1423, 1428 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 500 (petition of AETC); 115 S.Ct. 1962 (1995)(petition of Forbes). The district court subsequently dismissed Forbes' complaint for failure to state a claim. *See Forbes v. Arkansas Educational Television Comm'n* (*Forbes II*), 93 F.3d 497, 500 (8th Cir. 1996).

The Eighth Circuit reinstated the First Amendment claim on appeal, overruling *DeYoung* in part. Specifically, the Eighth Circuit held that, if the facts showed that AETN had created a "limited public forum" for the televised debate, "then Forbes would have a First Amendment right to participate" and "could be excluded only if AETN had a sufficient government interest." *Forbes I*, 22 F.3d at 1429. The court further held that "if AETN failed to include Forbes because of objections to his viewpoint, it has violated his First Amendment rights," even if the state-sponsored debate were a "nonpublic forum." *Id.* The case was remanded for factfinding on these two issues.

On remand, the case was tried to a jury, which found in response to special questions that AETN's decision to exclude Forbes was neither "the result of any political pressure coming from outside the professional staff of AETN," nor a product of "disagreement with his opinions." *Forbes II*, 93

F.3d at 501. Based on these answers, the district court found no viewpoint discrimination. Since the court had also ruled as a matter of law that the debate was a nonpublic forum, it entered judgment for AETN. *Id.*

The Eighth Circuit again reversed. Although approving the district court's handling of the viewpoint discrimination issue, it took issue with the trial judge's determination that AETN had not created a limited public forum when it sponsored the televised debate. Citing *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. __, 115 S.Ct. 2510 (1995), and *Widmar v. Vincent*, 454 U.S. 263 (1981), the court of appeals found that the debate was a limited public forum because AETN, "by staging the debate, opened its facilities to a particular group -- candidates running for the Third District Congressional seat." *Forbes II*, 93 F.3d at 504.[3] Emphasizing that "we are dealing here with political speech by legally qualified candidates, a subject matter at the very core of the First Amendment," *id.*, the Eighth Circuit then held that the exclusion of Forbes was unconstitutional.

SUMMARY OF ARGUMENT

This case presents the narrow question whether a government-owned and operated broadcast network's ordinarily broad discretion to make editorial decisions must give way to First Amendment interests when the network sponsors a campaign debate among ballot-qualified candidates for political office, but excludes one such candidate on the ground that network executives do not consider his candida-

[3] Because the historical facts were not in dispute, the Eighth Circuit treated the limited public forum question as one of constitutional fact appropriate for *de novo* review under *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). *See Forbes II*, 93 F.3d at 502-03.

cy "viable" and believe that the public would be "best served" by not hearing his views. Accordingly, the case presents no occasion to question a government broadcaster's general authority to make programming decisions, advance some points of view, and exclude others. Still less does it raise any issue regarding access by outsiders to programs produced and aired by *private* broadcasters, whether for-profit or nonprofit, and regardless of whether they receive government funds.

A candidate's debate sponsored by a government broadcaster is different from almost all other television programming not only, as we argue below, because the debate constitutes a limited public forum for speech by the small, easily defined class of ballot-qualified candidates, but because the stakes are particularly high. As this Court has repeatedly noted, the First Amendment has "its fullest and most urgent application" to speech by candidates in a political campaign. *Buckley v. Valeo*, 424 U.S. 1, 15 (1974) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Because the inevitable consequence of a decision by government broadcasters to exclude a ballot-qualified candidate will be to diminish that candidate's visibility, deprive the public of an opportunity to hear his views, "skew the debate" toward mainstream, conventional ideas, and accordingly distort the democratic process, the Court should recognize a narrow, First Amendment-based exception in these circumstances to the general proposition that government broadcasters have editorial discretion to determine the nature and viewpoint of their programming.

The Eighth Circuit thus correctly ruled that AETN's sponsorship of the candidates' debate created a limited public forum. Unlike most programming on a government-owned television station, which is simply not a forum for speech by the general public, a televised debate for a particular political office is by its nature a forum created for po-

litical advocacy by a particular class of speakers -- here, ballot-qualified candidates for that office. AETN intentionally opened this program to a limited class of ballot-qualified candidates, and the program was completely "compatib[le] with [their] expressive activity." *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 802 (1985).

The Eighth Circuit erred, however, in concluding that the exclusion of Forbes was not viewpoint-based. Although the jury found that AETN did not reject Forbes because of hostility to his views or outside political pressure, the network's very conclusion that he was not "viable" and that the public was "best served" by not being exposed to his ideas was fundamentally viewpoint-discriminatory because it represented a judgment that nonmainstream or controversial opinions are not worth hearing. Thus, regardless of the nature of the forum created by a government-sponsored candidates' debate, AETN's exclusion of Forbes on the basis of perceived nonviability or unpopularity violated the strong First Amendment command of viewpoint neutrality.

The rejection of Forbes was also, as the Eighth Circuit ruled, fundamentally unreasonable "in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806. It vests too much discretion in state employees -- even when they are journalists -- to permit them to exclude a ballot-qualified candidate from a televised debate based on their perception that hearing the candidate's views will not be in the best interests of the public. Indeed, such an exclusion contravenes AETN's own educational purpose because it deprives the public of political information and ideas in the important context of an electoral campaign.

Recognizing the existence of a limited public forum here, and acknowledging that the exclusion of Forbes was both unreasonable and viewpoint-based, will not interfere

with the otherwise broad discretion of government broadcasters to determine the nature and quality of their programming. This case turns on two relatively unique facts: the creation of a forum and the context of an election. When these facts are not present, a state-owned broadcasting station resembles in many respects a public library, a public museum, or even a public university -- entities owned and financed by government, yet vesting substantial editorial discretion in the professional employees who decide what literature, art, or educational materials will be communicated. Under other circumstances, therefore, the professional decisions of these employees are themselves entitled to First Amendment protection -- as, for example, when a state-employed university professor resists forced loyalty oaths or other infringements of academic freedom. However, as the present facts demonstrate, these employees are *also* state actors, and in some cases can violate the First Amendment rights of others.

ARGUMENT

I. GOVERNMENT BROADCASTERS ARE GENERALLY ENTITLED TO BROAD PROGRAMMING DISCRETION AND GOVERNMENT BROADCAST NETWORKS SHOULD NOT BE REGARDED, FOR MOST PURPOSES, AS A FORUM FOR SPEECH BY MEMBERS OF THE PUBLIC

The question of whether and how the First Amendment applies to a government agency that operates a broadcast network is a complex one. On the one hand, it is clear that the First Amendment "protects the press *from* governmental interference; it confers no analogous protection *on* the Government." *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973)(emphasis in original)

(Stewart, J., concurring). At the same time, the care that AETN has taken to establish its editorial integrity undoubtedly reflects important First Amendment values, including the right of the public to receive information free from partisan political constraints. *See Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982); *Lamont v. Postmaster General*, 381 U.S. 301 (1965). As AETN's Programming Policy makes clear, the network asserts a high degree of editorial independence and does not view itself as simply a propaganda arm of the state. *A fortiori*, this is true of the journalists employed by AETN.[4]

Accordingly, *amici* agree with the observation of the plurality in *Muir v. Alabama Educational Television*

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[4] Their status as public employees does not divest them of their First Amendment rights. *See, e.g., Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968). Moreover, government-employed professionals working in traditional realms of intellectual inquiry and free expression, such as libraries or public universities, have heightened constitutional protection. *E.g., Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957); *id.* at 262-63 (Frankfurter, J., concurring); *Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967).

This does not mean, however, that a government broadcast agency itself has First Amendment rights, as AETN argues. Petitioner's Brief at 42-46. AETN's error is to confuse the free speech and academic freedom rights of public employees *vis-a-vis* the agencies that employ them with management decisions of the government agencies themselves.

Because AETN and AETC are unquestionably agencies of state government, this case does not raise the question whether government-created private entities like the Corporation for Public Broadcasting or the Legal Services Corporation may in some circumstances have First Amendment rights. *Cf. Lebron v. National Railroad Passenger Corp.*, 513 U.S. __, __, 115 S.Ct. 961, 970 (1995).

Comm'n, 688 F.2d 1033, 1041 (5th Cir. 1982)(*en banc*), *cert. denied*, 460 U.S. 1023 (1983)(rejecting a First Amendment challenge to the cancellation of a controversial program), that government broadcasters generally should have the same ability "to make free programming decisions as their private counterparts." As Judge Rubin explained in a separate concurring opinion (joined by Judges Politz, Randall and Williams):

> The function of a state agency operating an informational medium is significant in determining first amendment restrictions on its actions. State agencies publish alumni bulletins, newsletters devoted to better farming practices, and law reviews; they operate or subsidize art museums and theater companies and student newspapers . . . . The first amendment does not dictate that what will be said or performed or published or broadcast in these activities will be entirely content-neutral. In those activities that, like television broadcasting to the general public, depend in part on audience interest, appraisal of audience interest and suitability for publication or broadcast inevitably involves judgment of content.

Id. at 1050.[5]

Thus, even though a government agency, AETN retains editorial discretion in most circumstances to design programming that it believes is educational and valuable without oversight by the judiciary or any other branch of government.[6] Properly understood, most of a government broadcaster's programming decisions simply do not fit within traditional forum analysis because the broadcaster has not ceded its platform to outside speakers. *Compare Lamb's*

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[5] The difficulty of defining exactly how AETN fits in the broad and diverse category of government speech is exemplified by the conflicting positions taken by AETN itself (Pet.Br. at 44, arguing that AETN is actually *adversarial* to the state), and the *amici* States of California, *et al.* (arguing that government is always the speaker where it owns and operates the broadcast entity).

[6] Although they have substantial editorial discretion, government-owned broadcast stations are *not* equivalent for constitutional purposes to private nonprofit broadcasters that simply receive some degree of government financing. First, unlike private nonprofits, government broadcasters are state actors, with constitutional obligations of their own. Second, private broadcasters have full First Amendment rights, whereas any First Amendment interest in government broadcasting would inhere in its employees, not in the agency itself (see note 4, *supra*).

AETN and some of the *amici* attempt to obscure any distinction between the private and the government-operated press by broadly citing *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364 (1984). *FCC v. League*, however, involved the First Amendment rights of *private* noncommercial broadcasters. *Id.* at 393-95. The present case, by contrast, concerns only the obligations of government agencies holding broadcast licenses in those limited situations when they open up a forum for qualified electoral candidates. Thus, the fear of the *amici* Association of American Public Television Stations (AAPTS) that affirmance of the Eighth Circuit's judgment would have dire effects on private broadcasters is misplaced.

Likewise, the Federal Communication Commission's concern that an affirmance here would undermine the overall editorial independence that it expects from its licensees is misplaced. Moreover, it is oddly illogical, considering the controls that the agency itself exerts over programming content, and not only with respect to campaign coverage. *E.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); FCC Brief at 3-4 (broadcasting must be responsible to "identified needs of the community"); *id.* at 6 (under 47 U.S.C. §315(a) as currently interpreted by the Commission, FCC decides whether broadcaster qualifies for exemption from candidate access requirement based on its assessment of "reasonableness" and "good faith" of broadcaster's decision).

Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993). Even invited guests who appear on a program generally do so within a format over which the broadcaster retains editorial control.[7]

But because AETN is a government agency, it is also bound by the First Amendment, and once it exercises its discretion to create a forum for qualified political candidates it must bear the constitutional consequences of its decision.[8] Despite disagreements over the outcome, the various opinions in *Muir* accepted the principle that government broadcasters may be subject to First Amendment constraints in appropriate circumstances. *See* 688 F.2d at 1050 (Rubin, J., *et al.*, concurring)(different First Amendment requirements exist when state is "conducting an activity that functions as a marketplace of ideas" than when it "is devoted to a specific function" such as publishing a military newspaper or holding a press conference); *id.* at 1053-60 (Johnson, Hatchett, Anderson, Tate, and Thomas A. Clark, JJ., dissenting) (government broadcaster's cancellation of already scheduled program because of political pressure should be seen as unconstitutional); *id.* at 1060 (Reavley, J., dissenting)(government broadcaster has editorial discretion, but may not make decisions based upon "viewpoint alone"). Even the court in *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d 486, 489 (11th Cir. 1990), *cert. denied*, 112 S.Ct. 71 (1991), although denying the First Amendment claims of two candidates excluded from state-sponsored television debates, noted that "the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment."[9]

This Court has also recognized that state actors have constitutional obligations to the public when they publish, broadcast, distribute literature, or otherwise engage in the business of communicating ideas. In *Board of Education v. Pico*, 457 U.S. at 870-71, a plurality held that the First Amendment limits the power of local school boards to remove books for ideological reasons.[10] Other courts have

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[7] It is certainly possible that AETN or other government broadcasters could transform some of their programs (other than political campaign debates) into fora for speech by at least some members of the public by inviting them to participate on a viewpoint-neutral basis. However, there are not many programs other than a campaign debate that could easily be classified as a *limited public forum*. Indeed, it is difficult to imagine other contexts in which the "class of speakers" entitled to access would be so readily identifiable, and in which the "nature of the [program]" would be so clearly "compatib[le] with expressive activity" by members of that class. *Cornelius*, 473 U.S. at 802 (*see* Point II, *infra*).

[8] Because AETN is part of Arkansas' state government, it is different not only from private broadcasters but from other private debate sponsors. *Compare Perot v. Federal Election Comm'n*, 97 F.3d 553, 558 (D.C.Cir. 1996), *cert. denied*, __ U.S. __, 65 U.S.L.W. 3753 (1997).

[9] A scholar has suggested that where government broadcasters have clearly delineated lines of editorial decisionmaking, outside political interference "by the governing board or other public official would be as objectionable in first amendment terms as similar intervention by a university president . . . in the case of a state university press." William C. Canby, Jr., "The First Amendment and the State as Editor: Implications for Public Broadcasting," 52 Tex.L.Rev. 1123, 1164 (1974). *Cf.* David Cole, "Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech," 67 N.Y.U.L.Rev. 675 (1992) (proposing "spheres of neutrality" where government funds universities and other traditional fora for free expression).

[10] A concurrence by Justice White, who provided the fifth vote in *Pico*, implicitly assumed that some reasons for library book removal would violate the First Amendment, 457 U.S. at 883, as, indeed, three of the dissenters stated explicitly as well. *Id.* at 907 (Rehnquist, Powell, and Burger, JJ., dissenting).

come to like conclusions as they have struggled to balance the competing claims of the public and of government decisionmakers in dealing with government-disseminated speech.[11] *E.g.*, *Serra v. General Services Admin.*, 847 F.2d 1045, 1048-49 (2d Cir. 1988)(citing *Pico*)(even with respect to government-owned artwork, "there are conceivably situations in which the Government's exercise of its discretion . . . could violate the First Amendment rights of the public . . . [I]t is possible that the Government's broad discretion to dispose of its property could be exercised in an impermissibly repressive partisan or political manner"); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 381-82 (5th Cir. 1989)(even though state-owned bar journal has editorial independence, it is nevertheless bound by First Amendment, so that decisions must be reasonable and viewpoint-neutral); *Bryant v. Secretary of the Army*, 862 F.Supp. 574 (D.D.C. 1994)(rule banning writings "not in consonance with policies of the Department of the Army" in "personal commentary" section of military publication is unconstitutionally viewpoint-based); *Aldrich v. Knab*, 858 F.Supp. 1480, 1490-94 (W.D.Wash. 1994)(state university-owned radio station had opened itself as nonpublic forum to speech by volunteers and thus could make general editorial decisions but not discriminate based on speakers' viewpoints).

As in *Pico*, *Serra*, *Estiverne*, *Bryant*, and *Aldrich*, so here, the problem is to reconcile the government-employed speakers' discretion with the public's First Amendment right

[11] On the problem of reconciling the editorial independence of government-employed speakers with the First Amendment rights of members of the public, *see* Mark G. Yudof, WHEN GOVERNMENT SPEAKS (1983); Steven Shiffrin, "Government Speech," 27 U.C.L.A. L.Rev. 565 (1980); Marjorie Heins, "Viewpoint Discrimination," 24 Hastings Con.L.Q. 99, 150-57 (1996).

to receive relevant information about a political campaign, and the candidate's First Amendment right to avoid discriminatory exclusion from a government-sponsored debate. Given that the First Amendment has "its fullest and most urgent application" to political campaign speech, *Buckley v. Valeo*, 424 U.S. at 14-15, the balance in this case must tilt in favor of Forbes and the public. As Judge Clark noted in *Chandler*,

> For the state to set up . . . a debate and exclude certain candidates not only puts its stamp of approval on the favored candidates, it also "curtail[s] access to ideas" by preventing the ideas and information that would be produced through the debating candidates' interaction from coming to light.

917 F.2d at 493-94 (Clark, J., dissenting).[12]

[12] Judge Clark's elaboration in this passage of the difference between campaign debates and other government broadcasting is instructive:

> [T]he decision to show or not to show a particular program or documentary and the ideas contained therein is very unlike the decision to exclude political parties from a debate. The positions put forward in a particular television program may find equally effective expression through a wide variety of media. I would not contend, therefore, that when the state shows a documentary it must include all viewpoints in that documentary. But an idea is not a candidate, and freedom of speech has greater meaning in the election arena. There is only one way for candidates themselves to argue their positions with each other: through the medium of a debate. A debate serves to inform the public far more effectively than any candidate's lone appearance could, by creating a synergism between the candidates' immediately conflicting positions.

917 F.2d at 493 (Clark, J., dissenting).

II. WHEN A GOVERNMENT BROADCASTER SPONSORS AND AIRS A POLITICAL CAMPAIGN DEBATE, IT CREATES A LIMITED PUBLIC FORUM FOR SPEECH BY BALLOT-QUALIFIED CANDIDATES

In this case, AETN's editorial discretion was limited by its creation of a limited public forum for speech by candidates for the Third Congressional District.[13] That is, the televised debate was not like most AETN programs, in which the government broadcasters frame the subject matter and decide what viewpoints will be heard. Instead, for purposes of the debate AETN essentially turned the microphone over to the candidates. As Judge Clark perceived in *Chandler*, so here, AETN "already decided to give over its airwaves to political contenders for [elected] office[]." 917 F.2d at 493 (Clark, J., dissenting).

This Court ruled in *Cornelius* that two factors guide the determination whether a state agency has opened a limited forum for citizens' speech: first, the agency's intent "to designate a place not traditionally open to assembly and debate as a public forum" and, second, "the nature of the property and its compatibility with expressive activity." 473 U.S. at 802. AETN's candidate debate satisfies both of these requirements.

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[13] The forum at issue here is the debate, not AETN as a whole. *See, e.g., Cornelius*, 473 U.S. at 801 ("in defining the forum we have focused on the access sought by the speaker"); *Lebron v. National Railroad Passenger Corp.*, 69 F.3d 650, 655-56 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2537 (1996)(same). Thus, the majority in *Chandler* erred when it assumed (without discussion) that forum analysis is an all-or-nothing proposition in which either the entire network is a "pure marketplace of ideas," or the state has total discretion as to *all* programming decisions. 917 F.2d at 488. Similarly, AETN and its *amici* err to the extent that they focus on the government network's programming as a whole rather than the one debate that is at issue.

First, by sponsoring the debate AETN opened to ballot-qualified candidates a forum (a TV program) that is not generally available for members of the public. The fact that this was a forum so limited that only three people qualified does not change its nature,[14] for Forbes was certainly in the "class of speakers" for which the forum was designed. As the Second Circuit explained in *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 692 (2d Cir. 1991), "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities *of a certain genre*, it may not selectively deny access for other activities of that genre" (emphasis added). *See also Estiverne*, 863 F.2d at 378 n.10 (in limited public forum, medium "must at least be designed to provide a vehicle for expressive activity by the class of speakers claiming access"). Thus, the Eighth Circuit properly ruled that AETN could not, "simply by its own ipse dixit, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation." *Forbes II*, 93 F.3d at 504. Or, as this Court reiterated in *Rosenberger*, 115 S.Ct. at 2517, "[o]nce it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set."[15]

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[14] Designated public fora usually are limited in their scope. As the Court explained in *Cornelius*, 473 U.S. at 803, the designated forum recognized in *Widmar v. Vincent*, 454 U.S. 263, was limited to meeting places for student expression; the forum in *Madison School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976), was limited to topics on the local school board meeting agenda. *See also Perry Educational Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 n.7 (1983)("[a] public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects")(citing *Widmar* and *Madison*).

[15] Indeed, if the law were otherwise, this Court's distinction between

(continued...)

The televised debate was also a limited public forum because of "the nature of the property and its compatibility with expressive activity" by all three candidates. *Cornelius*, 473 U.S. at 802. As noted, as a ballot-qualified candidate Forbes was a member of the limited class whose campaign speech was compatible with the forum that AETN created. Indeed, AETN's advertisement created the impression that all candidates were included -- "Do you know your candidate? Get better acquainted with the candidates and the issues . . . ." (J.A. 135) -- while falsely implying that the Republican and Democratic nominees were the *only* available choices.

AETN and its *amici*, making a great issue of Forbes' limited support and shoestring approach to campaigning, argue essentially that AETN can redefine the forum to include only "serious" or "viable" candidates.[16] But the State of Arkansas had already determined Forbes' viability by certifying that he was ballot-qualified. In rejecting Forbes, AETN in essence made a judgment that his ideas were not worth hearing despite his ballot-qualified status -- a judgment that condemned him to marginality, and that government agencies should not make even under the guise of journalistic discretion. For, as scholars have observed with respect to independent candidacies, "[t]he prophecy that a candidate cannot win is self-fulfilling." Steven J. Rosenstone, Roy L. Behr, & Edward Lazarus, THIRD PARTIES IN AMERICA 39 (2d ed. 1984). Because state broadcasters, like public schools and other government agencies, have unique potential for manufacturing consent, indoctrinating, and controlling access to ideas,[17] there is particular danger of skewing the political process in favor of the status quo when a government agency decides that the public would be "best served" by hearing only the views of the major parties.

Ultimately, the "nature of the forum" is compatible with expressive activity by all three candidates because of the political and historical importance of independent parties in electoral campaigns. Independent and third party candidates have long been gadflies, challengers, and question-raisers. This Court has noted that "[h]istorically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the mainstream," *Anderson v. Celebreeze*, 460 U.S. 780, 794 (1983); and that "[a]ll political ideas cannot and should not be channeled into the programs of the two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were

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[15] (...continued)
limited public fora and nonpublic fora would collapse. In both instances, government has provided some opportunity for expression by members of the public on government property or in government-controlled media that otherwise are not open for citizen speech of any sort. In nonpublic fora, government can impose restrictions on citizen speech so long as they are reasonable and viewpoint-neutral. In limited public fora, the same rules apply; the only difference is that government cannot for any reason, whether viewpoint-based or not, exclude speakers who are otherwise within the class or genre for which the forum was designated. If AETN may constitutionally exclude Forbes, who as a ballot-qualified candidate for Congress was clearly within the class or genre of speakers encompassed by the candidates' debate, then the limited public forum category ceases to have any meaning separate from the nonpublic forum.

[16] Forbes had in fact won 13.8% of the vote in the Republican primary runoff for Lieutenant Governor in 1990 (J.A. 145).

[17] *See* Yudof, WHEN GOVERNMENT SPEAKS xv, 200-11.

ultimately accepted." *Sweezy v. New Hampshire*, 354 U.S. at 250-51.

This process of challenging the comfortable views of the major parties and forcing mainstream candidates to confront questions that they might otherwise ignore is critical to the process of peaceful social change. Third parties have a unique capacity "to affect the content and range of political discourse, and ultimately public policy, by raising issues and options that the two major parties have ignored." Rosenstone, *et al.*, THIRD PARTIES IN AMERICA at 8. History thus belies any notion that a ballot-qualified candidate's relative lack of immediate electoral "viability" makes his participation in a government-sponsored debate "incompatible" with the nature of the forum.[18]

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[18] It also cannot be a sufficient argument against finding the debate to be a limited public forum that accommodating independent candidates might prove logistically unwieldy. For example, the numbers cited in the AAPTS Brief at 14-15 regarding presidential and other candidates appearing on ballots in recent years are misleading to the extent they suggest that a flood of idiosyncratic or unimportant candidates are crowding ballots throughout the land. Twenty-three presidential candidates appearing on the ballot in at least one state hardly amounts to 23 aspirants seeking to participate in debates in every state. In the present case, there were only three ballot-qualified candidates for the Third District seat. In the rare situations where an unmanageable number of candidates have qualified for the ballot, the government broadcaster can surely evolve reasonable content-neutral time, place and manner rules so that cacophony does not result. *See, e.g., McGlynn v. New Jersey Public Broadcasting Auth.*, 88 N.J. 112, 129, 439 A.2d 54, 62 (1981)(statutory access provision permits government broadcaster flexibility to determine the manner in which candidates will debate if the number is unwieldy).

Moreover, claims that major party candidates will refuse to debate minor party ones are both speculative and insufficient to establish a compelling interest in suppressing nonmainstream political voices. Indeed, this "major candidate veto" argument is akin to the "heckler's veto" argument that has rarely been considered a legitimate basis for restricting unpopular speech.

As this Court has often recognized, political campaign speech is at the heart of the First Amendment. *See, e.g., Buckley v. Valeo*, 424 U.S. at 14-15; *Mills v. Alabama*, 384 U.S. 214, 218 (1966)("a major purpose" of First Amendment "was to protect the free discussion of governmental affairs , . . . of course includ[ing] discussions of candidates"). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. __, __, 115 S.Ct. 1511, 1519 (1995). AETN's debate program was a limited public forum most fundamentally because at the very heart of our democracy is the principle that all ballot-qualified candidates for political office should be heard, and therefore that a government broadcaster cannot close a campaign debate to those aspirants whom it deems unsuitable, or whose ideas it thinks most voters will not take seriously.

III. REGARDLESS OF THE NATURE OF THE FORUM CREATED BY AETN, ITS EXCLUSION OF FORBES WAS UNCONSTITUTIONALLY VIEWPOINT-BASED AND NOT REASONABLY RELATED TO THE PURPOSE OF THE DEBATE

As *Perry Educational Ass'n*, *Cornelius* and, mostly recently, *Rosenberger* have made clear, even when a forum for citizen speech is "nonpublic," a government decision to deny access must be both "reasonable in light of the purpose served by the forum" and "viewpoint-neutral." *Cornelius*, 473 U.S. at 806. AETN's decision to exclude Forbes was neither. Since the televised debate was at the very least a "nonpublic forum" for ballot-qualified candidates, the exclusion of Forbes was unconstitutional regardless of how the

Court ultimately characterizes the debate for purposes of forum analysis.

A. Deciding That a Ballot-Qualified Candidate Is Not Viable Or That The Public Will Be "Best Served" By Excluding Him From A Debate Is Viewpoint Discrimination

This Court in *Rosenberger* held that a public university's denial of student activity funding to a publication that promoted a "religious perspective" was unconstitutionally viewpoint-based. 115 S.Ct. at 2518. The Court rejected a narrowly "bipolar" definition of viewpoint discrimination in favor of a more realistic understanding that public debate is by nature "complex and multi-faceted," and that discrimination against whole categories of ideas can "skew" that debate "in multiple ways." *Id. See also Lamb's Chapel v. Center Moriches*, 508 U.S. at 390-91.

The *Rosenberger* ruling is consistent with numerous precedents condemning discrimination against ideas or speakers because they are deemed "dangerous," unpopular, or controversial. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 115 S.Ct. at 1519 (controversial political viewpoints are "the essence of First Amendment expression"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989)(government may not prohibit expression of ideas simply because they are disagreeable); *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 537-38 (1980)(rejecting argument that government can constitutionally restrict both sides on "controversial issues of public policy"; "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth"); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983)(government may not discriminate in subsidy or benefit programs "in such a way as to '[aim]

at the suppression of dangerous ideas'")(quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959), and *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).[19]

The Eighth Circuit thus understood the concept of viewpoint discrimination too narrowly. Viewpoint discrimination occurs not only when a government agency acts, in a "bipolar" sense, out of hostility to a particular point of view, but when it disfavors a minority perspective on a given subject because it is unpopular, marginal, controversial, or otherwise not deemed to "best serve" the viewing public. As Judge Clark observed in *Chandler*, excluding minor party candidates based on judgments about the best interests of the voters amounts to viewpoint discrimination because it derives from a belief that "the viewpoints of the Libertarians [are] less valuable than those of the Democrats and Republicans." 917 F.2d at 491-92 (dissenting opinion). So here, as the Brief *Amici Curiae* of the States of California, *et al.*, in fact acknowledges, excluding Forbes "convey[ed] the message" of the government that his candidacy was not worthy of attention. AETN's disqualification of Forbes was viewpoint discriminatory because it arose from a bias favoring the status quo, valuing major over minor party candidates and ideas, and *de*valuing the uninhibited and wide-ranging political debate that the First Amendment contemplates.

B. Excluding Forbes was Unreasonable in Light of the Forum's Purpose

AETN's decision to exclude Forbes based on its judgment that he was not a viable candidate, and that the public would not be "best served" by hearing his views, was also

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[19] On the viewpoint discriminatory nature of government actions that disfavor controversial or unpopular ideas, *see* Heins, *Viewpoint Discrimination*, 24 Hastings Con.L.Q. 99.

unreasonable in light of the purpose of a televised debate. As noted above, judgments about a candidate's viability or likelihood of success too often become self-fulfilling prophecies. Moreover, minor party candidates raise issues that the more mainstream candidates would otherwise ignore. *See* Point II, *supra*. Thus, the fundamental purposes of a political debate among qualified candidates are ill-served when government excludes those holding opinions that are considered controversial, unpopular, or radical.[20]

Forbes' exclusion was particularly unreasonable in light of AETN's own policy commitment to "further the goals of a democratic society by enhancing public access to the *full range of ideas and viewpoints required for citizens/voters to make informed judgments* about the issues of our time." Cert.App. 100a (emphasis added). The network violated this provision of its own Programming Policy when it took it upon itself to decide that the voters were "best served" by not hearing the views of one of the contest's ballot-qualified candidates. Judged by its own standards, therefore, AETN's decision was unreasonable.

The Court of Appeals for the Fourth Circuit observed in *Multimedia Publications v. Greenville-Spartanburg Airport*, 991 F.2d 154, 159 (4th Cir. 1993), that the reasonableness of speech restrictions in a nonpublic forum should be scrutinized with some care because "protected First Amendment activity" is at stake. The court accordingly struck down a local airport's ban on newsracks because none of the reasons

[20] Nor does the FCC's current interpretation of 47 U.S.C. §315(a), exempting broadcaster-sponsored campaign debates from the statute's access requirements, establish that AETN's decision was reasonable for First Amendment purposes. As the AAPTS Brief notes, at 11-12, the FCC's construction has changed at least twice since §315(a) was enacted.

asserted to support it was persuasive. AETN's paternalistic judgment that it knew what was "best" for the voters of the Third District is equally unpersuasive, and was as unreasonable in relation to the purpose of a campaign debate as was the Greenville-Spartanburg Airport's newsrack ban in *Multimedia* or, for that matter, the Los Angeles Airport's decision to prohibit all First Amendment activity in *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

The court of appeals in this case accurately summarized the unreasonableness of AETN's action:

> AETN itself characterizes the criteria it used as . . . "essentially subjective" . . . . In a sense, the State of Arkansas had already, by statute, defined political viability. Mr. Forbes had gathered enough signatures to appear on the ballot. So far as the law was concerned, he had equal status with the Republican . . . and Democratic nominee. Whether he was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication . . . .
>
> The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.

Forbes II, 93 F.3d at 504-05.

AETN and its *amici* make exaggerated claims that the sky will fall on all editorial discretion for all noncommercial broadcasters if the Eighth Circuit's judgment is affirmed. But invalidating AETN's decision to exclude Forbes from its televised campaign debate will not interfere with the net-

work's journalistic control over the great bulk of its programming, will have no effect at all on the nongovernmental press, and represents a constitutionally proper balance between the editorial needs of government broadcasters and the First Amendment rights of the public and of nonmainstream candidates to an "uninhibited, robust, and wide-open" exchange of political views in a government-sponsored forum. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Marjorie Heins
(Counsel of Record)
Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

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